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ALL ALASKAN SEAFOODS, INC. v. M/V SEA PRODUCER
United States Court of Appeals, Ninth Circuit, 14 August 1989
882 F.2d 425

Claims for cargo damage against a ship as a common carrier can give rise to tort liability irrespective of contract obligations between the parties thereby entitling the claim to priority over a preferred ship's mortgage as a maritime lien. The Carriage of Goods By Sea Act does not apply by its own force to the contract between two parties when the contract is for carriage between two domestic ports.

FACTS: In October, 1986, All Alaskan Seafoods, Inc., ("All Alaskan") commenced an action against the M/V Sea Producer ("Sea Producer") and its operator, Express Marine Transportation Co., ("Express Marine") for cargo damage. All Alaskan alleged in its complaint, that it suffered losses totalling an estimated \$1.5 million when its shipment of frozen king crab thawed while en route from Molar, Alaska to Seattle, Washington. In addition, the shipment of king crab was contaminated by a refrigerant leakage in the hold of the Sea Producer. All Alaskan further alleged that the losses it suffered were caused by the negligence of Express Marine.

In April, 1987, People's National Bank of Washington ("People's") seeking to foreclose a preferred ship's mortgage on the Sea Producer intervened in the action. All Alaskan and People's filed cross motions, before discovery had commenced for partial summary judgment to establish priority of their respective liens against the vessel. All Alaskan's motion was denied; however, the district court granted partial summary judgment for People's Bank. The court held that All Alaskan's maritime lien on the Sea Producer was subordinate to People's ship's mortgage. The court concluded that under the Ship Mortgage Act, All Alaskan's claim for cargo damage sounded only in contract and not in tort, and therefore All Alaskan's claim was not entitled to priority as a maritime lien under 46 U.S.C. §953 (a)(2). All Alaskan appeals this judgment.

Although All Alaskan concedes that the order at issue is interlocutory in that its claims and those of People's mortgage remain adjudicated on the merits. It contends that appellate jurisdiction exists pursuant to 28 U.S.C. §1292 (a)(3). Appellees People's urge the court to reject jurisdiction relying on the Ninth Circuit's decision in *Seattle-First National Bank v. Bluewater Partnership*, 772 F.2d 565 (9th Cir. 1985).

All Alaskan also asks the court to rule, based on the evidence presented to the district court, that the Sea Producer was a common carrier and that the duty of due diligence codified in the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. §§1300-1315, applies by its own force to the contract between Express Marine and All Alaskan.

ISSUES: (1) Was the granting of the partial summary judgment to People's appealable under 28 U.S.C. §1292 (a)(3)?

(2) Did the district court err in ruling, as a matter of law, that All Alaskan's claim for cargo damage could only sound in contract and as a result would not be entitled to priority under the Ship Mortgage Act, 46 U.S.C. §953 (a)(2)?

(3) Was the Sea Producer a common carrier within the meaning of COGSA, 46 U.S.C. §§1300-1315?

ANALYSIS: The Ninth Circuit, in concluding that the district court's partial summary judgment on the issue of lien priority was appealable, rejected appellees' reliance on this court's ruling in *Seattle-First National Bank v. Bluewater Partnership*, 772 F.2d 565 (9th Cir. 1985). *Bluewater Partnership* also involved a challenge by lien claimants as to the validity of the preferred ship's mortgage held by Seattle-First National Bank. In denying appellate jurisdiction, the court pointed out that the challenge as to the validity of Seattle-First National Bank's mortgage was still pending following the interlocutory order and as a result the district court's liens priority determination could not have been final as to any of the lien claimants.

Here, however, although the parties seek their relative priorities as lien claimants, the validity of the People's preferred

ship's mortgage is unchallenged and there are no claims between All-Alaskan and People's against one another. The district court's partial summary judgment conclusively determined that priority of All Alaskan's lien by classifying it as a contractual lien, and thus not entitled to priority under 46 U.S.C. §953 (a)(2).

Accordingly, the Ninth Circuit concluded that the district court's partial summary judgment is appealable under 28 U.S.C. §1292 (a)(3) which grants the courts of appeals jurisdiction of appeals from: "(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."

All Alaskan's motion for summary judgment on the issue of lien priority alleged that the damage to its shipment resulted from the negligent operation of the Sea Producer as a common carrier. All Alaskan's cargo damage claim, then, would give rise to a tort lien which is superior, under the Ship Mortgage Act, to the preferred ship's mortgage held by People's.

The district court considered the contractual relationship between All Alaskan and Express Marine to preclude a maritime lien for damages premised on tort liability. However, following the analysis of the Fourth Circuit in *Oriente Com'l v. American Flag Vessel, M/V Floridian*, 529 F.2d 221 (4th Cir. 1975), neither the weight of authority nor the language of the Ship Mortgage Act justified the district court's decision. The Ninth Circuit found that if Express Marine breached its duty with respect to All Alaskan, then that breach of duty can give rise to tort liability irrespective of contract obligations between the parties. Although the district court was guided by important policy considerations, such as refusing to undercut the purpose of the Ship Mortgage Act (encouraging investment in the shipping industry), the Ninth Circuit held that it was an error for the lower court to rule, as matter of law, that All Alaskan's cargo claim could not sound in tort. Therefore, the district court's holding of partial summary judgment was reversed and the case was remanded so that the district court could determine the merits of All Alaskan's tort claim.

Finally, All Alaskan asked the court to rule that the Sea Producer was a common carrier and thus that the duty of due diligence codified in COGSA applies by its own force to the contract between Express Marine and All Alaskan. The court notes that COGSA would not, in fact, apply to the contract between the two parties because the contract was for carriage between two domestic ports. The federal statute governing bills of lading between two domestic ports is the Harter Act, 46 U.S.C. §§190-196. This statute would apply in the absence of an express agreement between the parties. The court concluded that even if Express Marine was not a common carrier for the purpose of this shipment, and that no federal statute applied, the parties could have incorporated a statutory standard by expressly adopting it in their contract. The Ninth Circuit held that these issues would be decided by the district court on remand.

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